SERVED: February 10, 1994

NTSB Order No. EA-4084

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. RAMON A. BORRERO, Respondent.	Docket SE-13121

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the respondent's appeal in this proceeding, arguing that it was neither timely filed nor perfected by the filing of a timely appeal brief, as required by Sections 821.47 and 821.48(a) of the Board's rules of practice, 49 CFR Part 821.[1] We will grant the motion.

[1]Sections 821.47 and 821.48(a) provide as follows:

§ 821.47 **Notice of Appeal.**

A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to §821.8) a notice of appeal within 10 days after an oral initial decision or an order has been served.

The law judge on July 21, 1993, following an evidentiary hearing at which respondent did not appear, rendered an oral initial decision affirming an order of the Administrator suspending the respondent's private pilot certificate (No. 2092770) until such time as he passes a flight test re-examination of his competence to hold that certificate.[2] Although advised by the law judge on the day of the hearing that the case would proceed in respondent's absence, respondent did not file a notice of appeal until August 31, or about a month late, apparently after receiving in the mail a copy of the hearing transcript containing the initial decision.[3]

Respondent essentially argues in answer to the motion to dismiss that because he was not present at the hearing, his ten day period for filing a notice of appeal should not be deemed to have begun until he learned of the outcome of the hearing.[4] We

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§ 821.48 **Briefs and oral argument.**

(a) Appeal briefs. Each appeal must be perfected within 50 days after service of an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

[2]The re-examination request was predicated on respondent's gear-up landing of a Cessna Model 210M aircraft on August 24, 1992. The record reflects that respondent had landed the same aircraft without lowering the wheels some three years earlier and was required to undergo a re-examination of his private pilot qualifications for that incident.

[3]Respondent's appeal brief, due on September 9, was not filed until October 27, 1993.

[4]In his opposition to the motion to dismiss and in his contemporaneously submitted appeal brief, filed October 27, 1993, respondent takes issue with the law judge's determination that he had received adequate notice of the hearing. We find no error in the law judge's decision in this respect. The notice of hearing was sent by certified mail to respondent at the two addresses given for him in the Administrator's order, one of which respondent used as a return address in appealing the order to the Board, and delivery receipts for both mailings of the hearing notice were returned to the Board. Although respondent may have given the law judge a new address when he talked to him just before the hearing convened, the Board had not previously been

have previously rejected this argument, see Administrator v. Brown, 5 NTSB 526 (1985), *aff'd* Brown v. NTSB, 795 F.2d 576 (6th Cir. 1986),[5] and respondent has identified no reason justifying a different result here. As we stated in Brown, "[s]ince the Board's rules of practice, a copy of which had been furnished to respondent, clearly authorize a law judge to issue an oral decision on the record, respondent...had notice that a decision on his challenge to the suspension order could be entered on the date of the hearing."[6] The issue, in other words, is not whether respondent was actually aware that a decision on his appeal had been reached in his absence, but whether he should have recognized that one might be. Our precedent establishes that he should have been alert to that possibility.

In the absence of good cause for respondent's noncompliance with the time limits for filing either a notice of appeal or an appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, NTSB Order No. EA-2781 (1988); Administrator v. Kalko, NTSB Order No. EA-3984 (served September 29, 1993).

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furnished a change of address for respondent. In fact, the first written indication in the record that respondent's address had changed appears on his August 31st notice of appeal. In these circumstances, respondent must be deemed to have had valid constructive notice of the hearing, even if he did not, as he claims, have actual notice of its scheduling until it was too late for him to attend.

[5]See also Administrator v. Fleischer, NTSB Order EA-3196 (1990), and Administrator v. Royal American Airways, Inc., NTSB Order No. EA-2346 (1986).

[6]We do not find it distinguishing that the respondent in Brown had made a deliberate decision, based on an objection to the hearing site, not to appear at his hearing, whereas the respondent here suggests that he would have appeared had he known of the hearing date. The intent of our ruling in Brown was not to punish the respondent for his nonappearance, but to dispel any view that nonattendance at a hearing altered the procedural requirements of the appeal process the airman had initiated, excused a subsequent failure to adhere to them, or in any way operated to relieve a party of the obligation to take such steps as may be necessary to preserve its right to appeal a law judge's decision to the full Board.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted, and

2. The respondent's appeal is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above order.